STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission **Phase 2 of the initial approvals for FutureGen Industrial Alliance, Inc.**	: : : :	**Docket No. 13-0034**

STAFF OF THE ILLINOIS COMMERCE COMMISSION

VERIFIED RESPONSE COMMENTS

JESSICA L. CARDONI
JOHN C. FEELEY
Office of General Counsel
Illinois Commerce Commission
160 North LaSalle Street, Suite C-800
Chicago, IL 60601
Phone: (312) 793-2877
Fax: (312) 793-1556
jcardoni@icc.illinois.gov
jfeeley@icc.illinois.gov

Counsel for the Staff of the Illinois Commerce Commission

April 10, 2013

Table of Contents

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ILLINOIS POWER AGENCY	:	
	:	
Phase 2 of the initial approvals for FutureGen Industrial Alliance, Inc.	:	**Docket No. 13-0034**
	:	

STAFF OF THE ILLINOIS COMMERCE COMMISSION

VERIFIED RESPONSE COMMENTS

Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, respectfully submits these Response Comments in accordance with the procedural schedule approved by the Administrative Law Judge ("ALJ"). Staff also submits the Affidavit of Richard J. Zuraski in support of facts and non-legal matters contained herein.

I. INTRODUCTION

On March 20, 2013, in accordance with the procedural schedule adopted by the ALJ (ALJ Ruling dated March 7, 2013), Initial Comments were submitted by the following: Staff, the Illinois Power Agency ("IPA"), the FutureGen Industrial Alliance, Inc. ("FutureGen Alliance"), Commonwealth Edison Company ("ComEd"), Ameren Illinois Company ("AIC"), and the Coalition of Energy Suppliers ("CES"). Staff's response to those comments where appropriate are set forth below:

II. RESPONSE COMMENTS

Staff, the IPA, FutureGen Alliance, ComEd, and AIC all agree that the workshop process was successful in narrowing issues and reaching consensus on a number of issues related to the sourcing agreement[1]. (ComEd Comments, p. 3; IPA Comments, section VI; FutureGen Alliance Comments, p. 2; and AIC Comments, p. 3;

With the exception of two issues raised in Staff's Initial Comments, all of Staff's concerns raised at the workshop regarding the sourcing agreement have been addressed to Staff's satisfaction in the FutureGen Alliance Revised Sourcing Agreement. With the proposed sourcing agreement revisions discussed in Staff's Initial Comments related to a debt capital cost review by the Commission and the methodology for determining the "Levelized Fix Carrying Charge Rate," Staff finds the FutureGen Alliance Revised Sourcing Agreement to be acceptable and recommends that the Commission approve it. Below Staff responds to certain comments made by ComEd, AIC, the IPA and the FutureGen Alliance.

A. Response to ComEd and AIC

1. Retirement of Environmental Attributes

ComEd requests that the Commission expressly determine whether a utility party to a sourcing agreement with a clean coal facility is required to receive and retire any or all emission credits generated by the clean coal facility in connection with the electricity covered by such agreement. (ComEd Comments, p. 3). AIC makes the same request. (AIC Comments, pp. 4-5).

[1] Along with the other parties that filed Initial Comments, CES participated in the workshop process but CES did not specifically comment on whether the workshop process was successful or unsuccessful.

Should the Commission determine that a utility party is not required to receive and retire any emission credits generated by the clean coal facility in connection with the electricity covered by the sourcing agreement, ComEd argues persuasively that the language in the FutureGen Alliance Revised Sourcing Agreement need not be revised. Conversely, if the Commission determines that a utility party is required to both receive ***and*** retire any, or any specific type of, emission credits generated by the clean coal facility in connection with the electricity covered by a sourcing agreement, then ComEd again argues persuasively that the agreement must be revised to require the delivery of such emission credits to the utility for retirement.

Section 1-75(d) presents two seemingly conflicting directions with respect to retirement versus sale of carbon emission credits. As ComEd states:

> Section 1-75(d)(1)(A) of the IPA Act provides that "a utility party to a sourcing agreement shall immediately retire any emission credits that it receives in connection with the electricity covered by such agreement." 20 ILCS 3855/1-75(d)(1)(A). Section 1-75(d)(1)(A) is a general requirement not specifically identified as an obligation related to the initial clean coal facility as defined in the IPA Act. Section 1-75(d)(3)(D)(v) further provides that "any carbon emission credits associated with sequestration of carbon from the facility must be permanently retired." 20 ILCS 3855/1-75(d)(3)(D)(v).[1] At the same time, Section 1-75(d)(3)(A)(ii), which appears intended to be a catch-all clause, provides "that all miscellaneous net revenue, including but not limited to net revenue from the sale of emission allowances, *if any*, … shall be credited against the revenue requirement for this initial clean coal facility …." 20 ILCS 3855/1- 75(d)(3)(A)(ii) (emph. added).

(ComEd Comments, p. 5, footnote 1 excluded)[2]. ComEd then concludes, "Read together, these provisions are clearly intended to require electric utilities to receive and retire carbon emission credits associated with the sourcing agreement." If the phrase,

[2] Staff would note that the correct cite with respect to the statutory language that "a utility party to a sourcing agreement shall immediately retire any emission credits that it receives in connection with the electricity covered by such agreement" is 20 ILCS 3855/1-75(d)(1) not (d)(1)(A). There is no such section 1-75(d)(1)(A).

"are clearly intended," was replaced with the phrase, "seem intended," Staff could agree with ComEd's conclusion. That is, Staff believes ComEd has provided a reasonable interpretation of the law, but not the only one.

ComEd attempts to buttress the above argument by opining that the hypothesized intention behind the cited portions of 20 ILCS 3855/1- 75(d):

> is also consistent with the gist of the clean coal provisions of the IPA Act as a whole, which focuses on capturing and sequestering carbon emissions from clean coal facilities. The definition of a clean coal facility in the IPA Act is "an electric generating facility that uses primarily coal as a feedstock *and that captures and sequesters carbon dioxide emissions* at [certain specified] levels …." 20 ILCS 3855/1-10 (emphasis added). It would be contrary to the overarching intent of the Legislature in establishing a clean coal portfolio standard tied to sequestration to not require the delivery and retirement of any credits associated with the requirement to capture and sequester carbon dioxide emissions that Illinois customers will be funding.

(ComEd Comments, pp. 5-6). However, Staff submits that there is nothing in the Illinois Power Agency Act ("IPA Act") representing an overarching intent of the Legislature in establishing a clean coal portfolio standard, let alone an overarching intent that requires retirement of emission credits. In support of this position, Staff quotes from Section 1-5 of the IPA Act, which states, in part:

> The General Assembly finds and declares:
>
> …
>
> (3) ***Escalating prices for electricity in Illinois pose a serious threat*** to the economic well-being, health, and safety of the residents of and the commerce and industry of the State.
>
> (4) ***To protect against this threat*** to economic well-being, health, and safety ***it is necessary*** to improve the process of procuring electricity to serve Illinois residents, to promote investment in energy efficiency and demand-response measures, and ***to support development of clean coal technologies*** and renewable resources.

> (5) Procuring a diverse electricity supply portfolio will ensure the lowest total cost over time for adequate, reliable, efficient, and environmentally sustainable electric service.

(20 ILCS 3855/1-5, emphasis added) It is clear that at least one of the reasons for enacting the clean coal provisions of the IPA Act was to diversify the electric supply portfolio. The Commission, itself, recognized the potential risk management benefits of the FutureGen project, when it concluded:

> The Commission agrees that the risk of carbon regulation and legislation is real and that FutureGen 2.0 will serve as a reasonable hedge against such future carbon risk, particularly as it relates to providing a continued market for the use of Illinois coal, an abundant State resource.

(Final Order, Docket No. 12-0544, December 19, 2012, p. 235) To fully take advantage of FutureGen (or any clean coal facility) as a protection against the risk of future carbon regulation and legislation and the impact of such regulation and legislation on the price of electricity for Illinois consumers, it would be necessary to sell all carbon emission allowances on the market and to credit the proceeds of such allowance sales to the facility's Illinois electricity customers. Thus, ComEd's case for requiring retirement (rather than sale) of emission allowances is not quite as robust as ComEd portrays.

2. Benchmarks

Both AIC and ComEd argue that final approval of a sourcing agreement with a retrofit clean coal facility, under the provisions of the IPA Act (20 ILCS 3855/1- 75(d)(5)), is contingent upon Commission approval of cost-based benchmarks developed by the procurement administrator, in consultation with the Commission staff, IPA staff and the procurement monitor, and upon a finding by the Commission that the sourcing agreement does not exceed such benchmarks. (AIC Comments, p. 4; ComEd

Comments, p. 8). Staff believes the comments of AIC and ComEd concerning benchmarks are consistent with the comments submitted by the Staff (Staff Comments, pp. 19-21).[3]

However, Staff does not agree with ComEd and AIC on the specific timing of the review of the benchmark and the timing of the determination of whether the sourcing agreement meets the benchmark. ComEd without any statutory support argues that "[b]ecause the Sourcing Agreement is not the result of a competitive bidding process, determination of the Sourcing Agreement's compliance with this requirement must occur in the instant proceeding to approve the Sourcing Agreement." AIC on the other hand, requests that the Commission include in any order approving the sourcing agreement that there be an express determination that the costs under the sourcing agreement shall not exceed the established bench mark. Staff finds no requirement under the IPA Act or the Public Utilities Act ("PUA") that the approval of the benchmark must take place in this docket as ComEd demands. Staff's position is that within this docket, Phase 2, the Commission need not approve the benchmarks and need not make determinations about whether the sourcing agreement exceed the benchmarks but does agree with ComEd and AIC that the sourcing agreement is subject to the Commission reviewing and approving a cost based bench mark and the sourcing agreement not

[3] In addition, Staff reiterates that it will ensure that the Commission receives one or more such benchmarks as soon as practicable, along with advice from the procurement administrator, Commission staff, IPA Agency staff, and/or the procurement monitor, with respect to making a determination that the FutureGen Alliance Revised Sourcing Agreement (and/or any subsequent draft sourcing agreements presented to the Commission during the course of this proceeding) does or does not exceed such benchmarks. Staff also reiterates that, within this phase 2 proceeding, the Commission need not approve benchmarks, and the Commission need not make determinations about whether or not sourcing agreements exceed benchmarks. Staff believes such approvals and determinations could be made outside this docket. However, Staff continues to recommend that the Commission complete such tasks as soon as practicable following the completion of this docket.

exceeding such cost-based bench mark. Furthermore, while nothing in the IPA Act or PUA specifically prevents the Commission from making the determination in this docket, it seems to Staff that since not all parties to the docket have a role in the determination of what the benchmark is (20 ILCS 3855/1-75(d)(5)) and accordingly there is no substantive evidence in the record on the benchmark issue in the record for phase 2 it would be unusual for a Commission order for Phase 2 to make a finding on the benchmark issue since orders are to be "based exclusively on the record for the decision in the case." (220 ILCS 5/10-103)

B. Response to IPA

1. Consensus items reflected in sourcing agreement

In its Comments, the IPA states:

> The IPA respectfully requests that the Commission effectuate the consensus achieved and approve the consensus portions of the Sourcing Agreement.

(IPA Comments, p. 6). Staff supports the concept of the Commission approving consensuses reached by the parties to the proceeding. Nevertheless, Staff must object to the IPA's request, at this time, on the grounds that the IPA's Comments fail to identify portions of the Sourcing Agreement where parties have achieved consensus. Indeed, the IPA itself admits, "Because some parties were still working on developing consensus over certain previously contested issues, the IPA does not wish to identify consensus items at this time." (IPA Comments, p. 5, footnote 1). As such, the IPA's request for approval of consensus portions of the sourcing agreement is vague and premature.

2. Benchmark approval process

The IPA recommends that the Commission: (1) consider and evaluate the benchmark required pursuant to Section 1-75(d)(5) of the IPA Act outside of this docket but in time for the Final Order in this docket; (2) consider only input from Staff, the Procurement Monitor, the Procurement Administrator, and the IPA in the approval process for the benchmark; and (3) keep the benchmark confidential. (IPA Comments, pp. 4-5). With respect to the first two recommendations, Staff has no objections. It is clear that Section 1-75(d)(5) of the IPA Act contemplates the benchmark being developed by a designated group of governmental agents, to the exclusion of other parties who might be more directly affected by the benchmark. Thus, there is no legal rationale for using a litigated proceeding for purposes of approving the benchmark.

With respect to the IPA's third recommendation, Staff notes that, in this instance, there is not a clearly compelling reason for confidentiality. In all previous IPA procurements, benchmarks have been used in the context of multi-bidder competitive procurement events, pursuant to the provisions of Section 16-111.5 of the PUA (220 ILCS 5/16-111.5). In such cases, revealing the benchmark to bidders would fundamentally alter their bidding strategies. However, the FutureGen contract is not the result of a competitive procurement event. It is a sole source contract for a unique project. Furthermore, the rates under the proposed sourcing agreement are to be set, not by a market-based price bid, but in accordance with a cost-based accounting mechanism, subject to audits and prudence review. Finally, the law is clear that the benchmarks used in the context of competitive procurement events for standard electricity products and renewable energy resources have to be treated confidentially by

the Commission, ICC Staff, Procurement Monitor, Procurement Administrator, and IPA (see, for example, 220 ILCS 5/16-111.5(e)(3)), but no such requirement exists for Section 1-75(d)(5) clean coal facility benchmarks. Notwitshstanding these observations, Staff remains neutral with respect to the IPA's recommendation to keep the benchmark confidential (in the tradition of all benchmarks that have been used, to date, in the context of competitive procurement events pursuant to 220 ILCS 5/16-111.5).

C. Response to FutureGen Alliance

1. Annual audits and reconciliations

The FutureGen Alliance in its comments states in part that it believes the issue of audits and reconciliations have been resolved through the workshop process. (FutureGen Alliance Initial Comments, pp. 5-6) The FutureGen Alliance further indicates that at the request of parties made at the workshop it added clarifying language to the sourcing agreement at section 5.2(a) on the audit issue and that section 5.2(d)(ix) already addressed the reconciliation issue. (*Id*.) The FutureGen Alliance also pointed out that the sourcing agreement was modified to include a reference to a Commission "Ordered Reconciliation Factor." Such a factor would come about from the result of reconciliation proceedings. The FutureGen Alliance concludes on both issues that no further prescription of reconciliation procedures or audits in the sourcing agreement is necessary. Staff agrees but points out that in Staff's Initial Comments Staff addressed certain issues related to the annual audits and reconciliations which it requested that the Commission order the FutureGen Alliance to do. Staff assumes that the proposals made in its comments are agreeable to the FutureGen Alliance but, in the

event that they are not, Staff will respond accordingly in its reply comments. With that understanding Staff believes the issue of annual audits and reconciliations is resolved and uncontested.

2. Periodic benchmark tests

FutureGen Alliance states that the benchmark described in the law associated with retrofit clean coal facilities like FutureGen "is not intended to be applied during the term of the Sourcing Agreement." (FutureGen Alliance Comments, p. 6). However, FutureGen Alliance provides absolutely no support for this assertion of the General Assembly's intent. As such, Staff recommends that the Commission reject the assertion. On the other hand, as noted in its Comments, Staff neither supports nor opposes the concept of on-going periodic benchmark tests throughout the 20-year term of the FutureGen 2.0 sourcing agreement. Staff also noted that the FutureGen Alliance Revised Sourcing Agreement now includes provisions recognizing that cost recovery for FutureGen is subject to periodic audit and review for prudence and reasonableness. Staff continues to take no position with respect to whether the Commission should find such periodic audits and reviews for prudence and reasonableness to be adequate substitutes for periodic benchmark tests.

3. Levelized fixed carrying charge rate

At page 9 of its Comments, "The FutureGen Alliance maintains that the Levelized Fixed Carrying Charge Rate should remain as approved by the Commission in the Final Order." However, the Levelized Fixed Carrying Charge Rate cannot "remain as approved by the Commission in the Final Order" because there was no Levelized Fixed Carrying Charge Rate approved by the Commission, nor was there a methodology

presented by the FutureGen Alliance for the Commission to approve. In its Comments, FutureGen Alliance again fails to describe, let alone justify, a methodology for computing the Levelized Fixed Carrying Charge Rate. In contrast, Staff presented a detailed methodology in its Comments and provided a thorough justification for its acceptance by the Commission in this docket. (Staff Comments, pp. 8-18). Staff continues to recommend that the Commission approve Staff's proposed methodology.

Finally, Staff notes that, while the FutureGen Alliance seems to call upon the Commission to adopt in this docket a specific Levelized Fixed Carrying Charge Rate (a value), it is Staff's firm belief that FutureGen Alliance and Staff are in agreement that the Commission should only be adopting a methodology for setting the Levelized Fixed Carrying Charge Rate. The final value for the rate cannot be determined until the actual cost of debt is established, in accordance with Section 5.2(b) of the FutureGen Alliance Revised Sourcing Agreement.

4. Heat Rate

FutureGen Alliance states:

> As part of the workshops, ICC Staff informed the FutureGen Alliance that it may have additional questions regarding the derivation of the heat rate specified in the Sourcing Agreement. The FutureGen Alliance, maintains that the Heat Rate should remain as approved by the Commission in the Final Order.

(FutureGen Alliance Comments, p. 10). First, it is not the heat rate, but the "Target Heat Rate," about which Staff has expressed concerns. Exhibit 5.2(d), Part D, of sourcing agreement makes reference to a factor "AHR" (which tracks actual heat rates experienced by FutureGen) and a factor "THR" (or "Target Heat Rate," which is a set of fixed values shown in the contract). When the former exceeds the latter, rates are

adjusted downward by a "Heat Rate Variance Adjustment." Second, Staff does not believe that the Commission approved the Target Heat Rates that were proposed by FutureGen Alliance for the first time in a brief on exceptions. The Commission's order in Docket 12-0544 includes no discussion or conclusion about heat rates or Target Heat Rates. Notwithstanding these objections to the FutureGen Alliance's characterizations, Staff has decided not to pursue previously-articulated concerns with the Target Heat Rates proposed by FutureGen Alliance.

5. Process for Resolving Outstanding Issues

The FutureGen Alliance seems to take the position that any issue(s) not raised during the workshops cannot be raised in a party's initial comments. ("The parties have invested considerable time and resources in this proceeding and, in particular, in preparation for and participation in the workshops. The time for raising additional issues not raised in the workshop process is now over." FutureGen Alliance Comments, p. 11) (emphasis added) If the FutureGen Alliance is indeed making such a proposal to the Commission, then Staff recommends the Commission reject the proposal for a number of reasons. First, nowhere in the Commission's initiating order or ALJ's procedural rulings has the Commission or the ALJ indicated that issues addressed in the docket had to be first raised at the workshops. In fact, the ALJ's ruling on March 7 contemplates that issues raised outside of the workshop could be addressed in the proceeding, when it states that after the filing of initial comments "[n]ew issues shall not be raised in Response or Reply Comments." If the ALJ intended that new issues could not be raised in initial comments, then the ruling would have stated new issues shall not

be raised in Initial Comments, Response Comments or Reply Comments. The ruling did not, it only stated new issues shall not be raised in Response and Reply Comments.

Second, the proposal by the FutureGen Alliance is inconsistent with the fundamental understanding parties operated under at the workshops. Before any discussions took place at the workshop all parties participating in the workshops agreed that in order to promote dialogue nothing a party said during the workshop could be used against that party outside of the workshop. The workshops in essence were like settlement discussions. Illinois courts have consistently held that matters related to offers of compromise and negotiations for settlement are ordinarily inadmissible. The rationale for this rule is that public policy favors the settlement of claims outside of court. (*Sawicki v. Kim*, 112 Ill.App3d 641, 644-645 (1983) If by agreement a party's statements at the workshop could not be used against that party outside of the workshop then it follows that what a party does not say at a workshop should also not be used against a party outside of the workshop. This position is consistent with the provisions under the law governing mediation and arbitration at the Commission governed by Section 5/10-101.1. ("the identification of issues by a party shall not foreclose that party from raising such other meritorious issues as that party might subsequently indentify")[4] The FutureGen Alliance wants the failure by a party to raise an issue at the workshop to prevent that party from discussing the issue in their comments. Such a position is fundamentally inconsistent with the fundamental

[4] Section 5/10-101.1 of the PUA allows by agreement of all parties for the voluntary mediation and voluntary binding arbitration of disputes arising under the PUA. As part of that process a case management conference which is held prior to an evidentiary hearing may be held. At that conference parties are to identify and simplify the issues, however "the identification of issues by a party shall not foreclose that party from raising such other meritorious issues as that party might subsequently identify." 220 ILCS 5/10-101.1(d).

workshop ground rule. For this reason alone the Commission should reject the FutureGen Alliance's proposal that any issue not raised during the workshop cannot be addressed in parties' initial comments. Staff does recognize that the ALJ made a procedural ruling that no party could raise a new issue in response or reply comments. (i.e. all issues to be addressed had to be raised in initial comments.) (ALJ Ruling, March 7, 2013) As discussed above, such a ruling by the ALJ is completely different then the FutureGen Alliance's proposal.

III. CONCLUSION

Staff respectfully requests that the Illinois Commerce Commission consider Staff's Comments and approve Staff's recommendations in this docket.

Respectfully submitted,

*/s/*_____
JESSICA L. CARDONI
JOHN C. FEELEY

Office of General Counsel
Illinois Commerce Commission
160 North LaSalle Street, Suite C-800
Chicago, IL 60601
Phone: (312) 793-2877
Fax: (312) 793-1556
jcardoni@icc.illinois.gov
jfeeley@icc.illinois.gov

Counsel for the Staff of the
Illinois Commerce Commission

April 10, 2013